



# NR&Co Quarterly

## ...Legal Briefs

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### KARIBU!

## Editor's Note



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It gives me immense joy to welcome you all to our first Newsletter of the year 2020.

There is no doubt that in so far as advancement in technology is concerned, ours is indeed a momentous age. Such technological advancement continues to manifest itself in various facets of our lives including our businesses. The law has also had to change in order to facilitate and to regulate technology. Law practitioners have also taken advantage of technology in the practice of law hence such concepts as e-lawyering and e-courts which appear to be gaining currency in some jurisdictions. It is therefore no surprise that this edition of our newsletter devotes a lot of attention to impact of technology on development of the law.

Under legislative update, we have analyzed the recent amendments to the Civil Procedure Rules to, among others, allow service of Court Summons through email and mobile-enabled messaging such as WhatsApp. Previously, service of summons was done mainly through physical hand-delivery which would often be time-consuming and expensive. We have also analyzed amendments introduced by the Business Laws Amendment Act including the provision allowing for signing of contracts using electronic signatures.

In the Case Highlights Section, we discuss the recent three-Judge High Court Judgment in **Nubian Rights Forum & 2 others v Hon. Attorney General & 6 Others**. The Consolidated Petitions challenged the government's operationalization of National Identity Integrated Management Systems (NIIMS) on, among other grounds, alleged violation of the right to privacy.

On the contributor's platform, we have included articles on extradition proceedings under Kenyan law, Powers of Capital Markets Authority and Climate Action through Investments.

This Newsletter would not be complete without mention of Covid-19, the global health crisis of our time. We have given you a glimpse of the effect of the pandemic on businesses and some of the legal issues which businesses in Kenya may have to confront in the coming days.

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## NEWS UPDATE

**E-lawyering,  
Virtual Law Practice and  
E-court**

Gone are the days that legal practice was confined to the four walls of the firm with large open spaces such as lawyers' units, reception areas, lounge, conference rooms and designated spaces for administrative assistants. The new virtual portals and web-based databases has enabled digitilisation of lawfirms hence promoting the e-lawyering approach.

Other jurisdictions such as the United Arab Emirates are embracing the concept of E-Court. Abu Dhabi Global Market Courts have partnered up with Microsoft to launch a digital e-court platform; a one-stop dispute resolution portal, serving global investors and the business. The new E-Court platform has enabled users to initiate, manage and monitor cases 24 hours seven days a week.

### **Covid-19 and its impact on various sectors**

These are indeed tough times in the history of our country and of the world. The world is currently battling the Covid-19 pandemic whose first case in Kenya was confirmed on 13<sup>th</sup> March, 2020. We take a glimpse on the impact of the pandemic in Kenya.

**Real Estate Sector:** Lands Registries have been closed hence conveyancing transactions have stalled due to challenges in the registration of instruments of disposition.

**Banking Sector:** As a result of closure of land registries, banks are unable to perfect securities hence inhibiting the advancement of loan facilities to persons.

**Judicial Sector:** The closure of the Court registries and temporary suspension of court related activities following a directive by Chief Justice Maraga means all cases which were fixed for hearing during the subject period will now not be heard. Parties will have to take fresh dates upon resumption of the Court activities. Also affected is the filing of Court Pleadings and Documents including new cases. Nonetheless, the judiciary has issued guidelines on electronic filing of documents in some Court Stations especially in Milimani Law Courts, Nairobi.

It is clear that the Covid-19 has impacted negatively on the businesses in the country especially after a directive was issued that, as far as possible, personnel employees should stop going to work and quarantine themselves at their respective houses. This has led to closure or down-scaling of many businesses being halted in the country following the directive which has in turn fueled speculation as to whether employees may lose jobs leading to disputes and litigations. Again, there is speculation that difficulties in the business environment caused by Covid-19 pandemic may lead to many businesses pleading the principles of "frustration" and "force majeure" in order to escape from commercial obligations which may prove too onerous to fulfill in the current circumstances. How far parties to a contract can go in evoking such legal principles remains to be seen and will be the subject of debate among legal practitioners and scholars. However, it would be safe to say that whether a party will be able to rely on such principles may depend largely on the wording of each individual contract.

### **1. Digital Lending Market Inquiry**

Section 18 (1) (a) of the Competition Act provides that the Competition Authority may conduct an inquiry or a sectoral study where it considers necessary for purposes of carrying out its functions. Pursuant to this section the authority intends to carry out a study into regulated and unregulated digital markets in Kenya with the financial support of Innovation for Poverty Action (IPA) and technical support from Financial Sector Deepening (FSD- Kenya).

The main aim of this study is to identify and address potential consumer protection concerns in the digital credit markets.

The objectives include:

1. Provide evidence regarding the size and nature of the digital credit market.
2. Identify potential consumer protection risks and consumer outcomes within Kenya's digital credit sector.
3. Increase transparency and comprehensiveness of product information and terms and conditions.
4. Address probable fraud in digital financial services.
5. Improve consumer redress for digital credit products;
6. Increase consumer control over personal information to expand choice and competition.
7. Inform the development of policies to ensure adequate consumer protection across regulated and unregulated lenders and equal protection of all Kenyan consumers.

## LEGISLATIVE UPDATES

In this Issue we highlight legislative developments concerning various aspects of technology.

### 1. Highlights of Civil Procedure

#### Amendment Rules 2020

Legal Notice Number 20 of 2020 has introduced various amendments to the Civil Procedure Rules, 2010. Some of the key amendments are concerned with the mode of service of summons to enter appearance upon a defendant.

In the new Civil Procedure Amendment Rules 2020, amendment to Order 3 has redefined small claims to mean simple claims whose monetary value does not exceed Two Hundred Thousand Kenya Shillings, an increase from the initial Kenya Shillings Forty Nine Thousand Nine Hundred and Ninety Nine.

The new amendment to Rule 3 of Order 5 deleted the words “postal address” and substituted it with the words “registered office” or “physical address.” This new introduction will allow process servers to effect service on a corporation by delivery of the Summons to the registered offices of the said corporation.

Summons may now be served upon the defendant by way of a registered courier service provider to the defendant’s last known physical address. Service thereof shall be deemed as sufficient when the person being served acknowledges receipt by affixing his signature on the document or on confirmation of delivery by the courier service provider.

The amendment has introduced service by way of Electronic Mail. Summons can now be sent to the defendant’s last confirmed and used email address. Service shall be deemed to have been duly effected when the sender receives a delivery receipt.

Mobile-enabled messaging Application has also been included as a mode of effecting service of summons upon the Defendant. Service shall be deemed to have been effected through mobile-enabled messaging services

when the Sender receives a delivery receipt. This introduction means that summons may now be sent to the defendant by way of WhatsApp and delivery thereof shall be deemed to have been duly effected by adducing a receipt showing the message has indeed been received by the defendant by virtue of blue ticks displaying on the message.

### 2. The Lowering of Central Bank Lending Rates

The Central Bank of Kenya through its Monetary Policy Committee (MPC) has lowered the base lending rate from 8.50% to 8.25% citing a decline of domestic macro-economic stability, potential risks to food supplies and increased global uncertainties. In their press release held on 27<sup>th</sup> January, 2020, MPC made several observations:

- The month on month inflation rate remained within the target range in November and December 2019.
- Inflation rate stood at 5.8% in December 2019 compared to 5.6% in November 2019, mainly reflecting the temporary effects of increases in food prices and transport costs during the festive period.
- Non-food-non-fuel inflation remained below 5%, indicative of muted demand pressures and limited spillover effects of recent tax adjustments.
- Overall inflation is expected to remain within the target range in the near term due to lower prices of fast going food items following the continuing rains, and lower electricity prices.
- The foreign exchange market has remained stable, supported by the narrowing of the current account deficit and balanced flows. The current account deficit narrowed to an estimated 4.6% of GDP in 2019 from 5% in 2018.
- The CBK foreign exchange reserves, which currently stands at USD 8,475 million, continue to provide adequate cover and buffer against short-term shocks in the foreign exchange market.

- The banking sector remains stable and resilient. Average commercial banks liquidity and capital adequacy ratios stood at 49.7% and 18.8% respectively in December 2019.
- Private sector credit grew by 7.1% in the 12 months to December 2019
- The economy remained resilient in 2019, with data for the third quarter showing that real GDP grew by 5.4% in the first three quarters.
- The MPC Private Sector Market Perception Survey conducted in January 2020 indicates that inflation remain well anchored, mainly due to expected lower food and electricity prices.
- Uncertainties remain elevated mainly due to continuing geopolitical and trade tensions

However, it is important to note that in light of the Covid-19 pandemic, the President made an announcement to reduce the Central Banking Lending Rates further to 7.25% from 8.25%.

### Legal Notice Number 12 OF 2020

### 3. The Companies (Beneficial Ownership Information) Regulations, 2020

Following the various amendments to the Companies Act to include express provisions requiring every company to have a beneficial owner as well as to keep a register of beneficial owners, the Companies (Beneficial Ownership Information) Regulations, 2020 have now been published.

The regulations prescribe ways in which companies should comply with their obligations in relation to beneficial ownership information.

**LEGISLATIVE UPDATES**

The regulations describe a beneficial owner as a natural person who:

1. Holds at least ten percent of the issued shares in the company either directly or indirectly.
2. Exercises at least ten percent of the voting rights in the company either directly or indirectly.
3. Holds a right, directly or indirectly, to appoint or remove a director of the company.
4. Exercises significant influence or control, directly or indirectly, over the company.

**How are companies affected by the regulations?**

Companies will now be required to take the following steps:

- 1) take reasonable steps to identify beneficial owners by investigating the nature of a shareholder's beneficial interest;
- 2) notify a person it reasonably believes to be a beneficial owner, to provide it with the relevant particulars for registration (if such person fails to respond within 14 days of being issued with a warning notice, the company is required to restrict their various interests in the company;
- 3) enter the necessary particulars of such beneficial owners into its Register of Members. These include, among others, one's birth certificate number, date of birth, residential address, telephone number, email address, nature of ownership or control, and date one became (or ceased to be) a beneficial owner of the company;
- 4) file the updated Register of Members within 30 days of its preparation with the Registrar of Companies (the Registrar) (failure to comply with this requirement is an offence and the company and its officers would each be liable to a fine of up to KES 500,000); and
- 5) lodge with the Registrar, in the prescribed form, a Register of Beneficial Owners (and changes to the same).

**How is beneficial ownership information to be dealt with?**

The regulations provide that a company shall not disclose information on its beneficial owner unless:

1. It is for communication with the beneficial owner.
2. It is in compliance with the requirements of the regulations.
3. It's in compliance with a Court Order.

Information on a beneficial owner may only be disclosed with the written consent of the beneficial owner.

The Registrar may use information relating to a beneficial owner for communicating with the beneficial owner.

Beneficial ownership information must not be available to the public, unless a competent authority requests the Registrar (in writing) to provide such information to the said authority.

Disclosure of beneficial ownership information contrary to the above is an offence which carries a fine of up to KES 20,000 or six months' imprisonment, or both.

**4. Business Laws Amendment Act 2019**

On 19<sup>th</sup> March, 2020 President Uhuru Kenyatta signed into law the Business Laws (Amendment) Bill 2019. The amendment is aimed at enhancing the ease of doing business in Kenya.

The Act is set to introduce changes to the various existing laws that impact on the conduct of business in Kenya. The Act amends the following Acts:

**The Law of Contract Act (Cap 23)**

The Act amends Section 3(6) to include electronic signatures as part of the valid form of execution of contracts.

**The Companies Act No. 17 of 2015**

The Act amends the Companies Act to delete the phrase "under common Seal." The effect

of this amendment is that contracts made by a company need not be under common seal but rather may be made by a company in writing or on behalf of a company by a person acting under its authority, express or implied.

The Act has amended section 504 to include subsections which have the effect of converting bearer shares to registered shares. As such, a company in respect of which a bearer share is issued, is obligated to ensure that such bearer share is converted to a registered share regardless of any contrary provisions of the company's memorandum and articles of association. The effect of this is increased disclosure and transparency as to the shareholding and ownership of companies.

The Act has further amended Section 611 with the effect that minority shareholding rights are no longer at risk of dilution or hostile takeover.

**Insolvency Act**

The amendment to Section 506A of the Insolvency Act provides that in addition to the already existing factors to be considered before the Court can lift a moratorium, the Court shall also consider the perishability of a movable asset and whether or not it used to maintain the company as a going concern.

The amendment to section 723 introduces a new section 723A which makes provision for the manner in which insolvency practitioners shall process requests for information by creditors as well as the time frame within which the information sought is to be released.



## CASE HIGHLIGHTS

In this segment we analyze a case which has drawn immense public interest and debate amongst legal scholars on such issues as the right to privacy, the right to equality and freedom from non-discrimination and the right to public participation in legislation and formulation of government policy.

### 1. Nubian Rights Forum & 2 others v Hon. Attorney General & 6 Others

The Nubian Rights Forum (NRF), Kenya Human Rights Commission (KHRC), and Kenya National Commission on Human Rights (KNCHR), filed three (3) Petitions in the High Court challenging various amendments to the Registration of Persons Act, Chapter 107 of the laws of Kenya. By extension, the three Petitioners challenged the operationalization of National Identity Integrated Management System (NIIMS), popularly known as Huduma Namba. In so doing, the Petitioners claimed that the amendments were passed in violation of the Constitution and that operationalizing NIIMS under the existing law would pose serious and immediate threats to fundamental rights and freedoms especially the right to privacy and the right to equality and freedom from non-discrimination. In particular, it was alleged that members of the Nubian Community and other marginalized communities would be discriminated under NIIMS.

The Petitions were consolidated and heard together. Vide their Judgement delivered on 30th January, 2020, the Honourable Lady Justice Nyamweya & Mumbi Ngugi and the Honourable Mr. Justice Korir identified three key issues arising for determination, namely:

- a) *Whether the legislative process leading up to the enactment of Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 was constitutional;*
- b) *Whether the amendments to the Registration of Persons Act through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 violated and/or threatened violation of the right to privacy contrary to Article 31 of the Constitution; and*
- c) *Whether the amendments to the Registration of Persons Act through the Statute Law (Miscellaneous Amendment) Act No. 18 of 2018 violated and/or threatened violation of the right to equality and freedom from discrimination contrary to Article 27 of the Constitution in respect of Nubians and other marginalised communities.*

In answering the issues listed above, the three-judge bench found that the process followed in enacting the impugned amendments was lawful and constitutional. In that regard, the Court held that the amendments were subjected to public participation as stipulated by the Constitution. Further, the Court held that Parliament could not be blamed for using an omnibus statute to pass amendments to various statutes and that use of an omnibus statute (as opposed to a stand-alone Bill) did not violate the Constitution. Further, the Court ruled that the impugned amendments did not concern Counties and therefore the National Assembly could not be faulted for passing the amendments without involving the Senate.

As regards to the right to privacy, the Court observed that the passage of the Data Protection Act would improve the data protection legal framework but observed that more still needed to be done. The Court also took issue with the impugned amendments in so far as they permitted collection of an individual's DNA and GPS co-ordinates even though the Government repeatedly stated that it was not interested in collecting such information.

The Court held that the impugned amendment did not contain discriminatory provisions either as against Nubians or as against any other community. Further, the Court observed that NRF'S witnesses did not adduce sufficient evidence to prove discrimination.

In summary, the Court allowed the Government to proceed to operationalize NIIMS subject to strengthening of the data protection legal framework. The specific Orders of the Court were as follows:

Orders of the Court were as follows:

- i) A Declaration that the collection of DNA and GPS co-ordinates for purposes of identification is intrusive and unnecessary, and to the extent that it is not authorized and specifically anchored in empowering legislation, it is unconstitutional and a violation of Article 31 of the Constitution, which enshrines the right to privacy.
- ii) Consequently, in so far as Section 5(1)(g) and 5(1)(h) of the Registration of Persons Act requires the collection of GPS co-ordinates and DNA, the said subsections are in conflict with Article 31 of the Constitution and are to that extent unconstitutional, null and void.
- iii) The Respondents are at liberty to proceed with the implementation of NIIMS, only on the condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable constitutional requirements identified in the Judgment are first enacted.
- iv) Each Party shall bear its own costs.

NRF and KHRC have since filed Notices of Appeal. NRF additionally filed an Application seeking Conservatory Orders aimed at suspending operationalization of NIIMS pending hearing and determination of the intended Appeal. However, at the date of publication of this Newsletter, the Application had not been allocated a hearing date. (For more information visit: <http://kenyalaw.org/caselaw/cases/view/172447/>)

## INTERLUDE



## Why the New Decade Begins in 2021, and not 2020

1<sup>st</sup> January, 2020 saw many mark what they thought was the turn of the decade. And this made sense because if the world ushered in the 3<sup>rd</sup> millennium on 1<sup>st</sup> January, 2000 and the beginning of the 2nd decade of this millennium on 1st January, 2010 then surely the next decade ought to begin on 1<sup>st</sup> January, 2020. However, were we mistaken?

The Gregorian Calendar, the official calendar system used around the world, is based on the Anno Domini numbering system devised by 6<sup>th</sup> Century monk, Dionysius Exiguus. Dionysius used Roman numerals to number the years since the “Year of our Lord” and it is a matter of fact that the numeral 0 was not part of Roman numerals and only came to be used in Europe around the 13<sup>th</sup> Century, following its invention by the Indians. Thus, as per Dionysius, the years went from 1 BC to 1 AD. There was no 0 BCE, meaning that the first decade began on 1<sup>st</sup> January, 1 AD and ended on 31<sup>st</sup> December, 10 AD. The next decade then began on 1<sup>st</sup> January, 11 AD and ended on 31<sup>st</sup> December, 20 AD. Extrapolating this line of argument to subsequent years and periods, the first millennium came to an end on 31<sup>st</sup> December, 1000 and the next one began on 1<sup>st</sup> January, 1001. We should have then celebrated the end of the second millennium in 2000 and the beginning of the next one in 2001. So where did we go wrong?

Perhaps if Cassius were penning this article, he would opine that the fault truly is not in the stars – it is in popular culture. Popular culture (pop culture) does not abide by scientific conventions. Pop culture references to periods of time such as the 60s, 80s and 90s birthed the modern confusion. The resultant effect was that these periods came to be defined as decades. The 90s ran from 1990 to 1999 but the reference to this time period as the 90s registered as a complete decade in people’s minds as a result of pop culture’s increasing hold over society.

This effect was compounded by the round number bias – the tendency of human beings to highlight big numbers. We celebrate milestones such as 30<sup>th</sup> birthdays and 50<sup>th</sup> anniversaries and so celebrating the beginning of a decade in a year suffixed with ‘0’ is only another classic case of round number bias in a line of many, as we tend to end things at 0 and begin new ones at 1.

It is unlikely that we will right these wrongs anytime soon. If anything, arguing over whether a new decade has begun or not only increases our chances of getting into bar fights and missing out on New Year party invitations. Perhaps, all this is of no significance because at the deepest foundations of society, time is a construct.

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## CONTRIBUTORS' PLATFORM

# Climate Action through Investment



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Kenya finally launched its first ever green bond on 20<sup>th</sup> January, 2020 in the Nairobi Securities Exchange and the London Stock Exchange. The bond was issued by Acorn Holdings Limited, a company which is known for developing and managing purpose built rental accommodation for young people in Nairobi, and private equity fund Helios Investment Partners Limited. The bond raised KShs. 4.3 Billion aimed at building up to 3,800 student hostel units in Nairobi under the Qwetu brand. Qwetu hostel's aim is to contribute to Kenya's commitment to achieve a minimum of 20% reduction in water energy and material efficiency through green buildings. This was facilitated by the Green Bond Programme - Kenya, which aims to promote financial sector innovation by developing a domestic green bond market. This was brought together by the Kenya Bankers Association (KBA), Nairobi Securities Exchange (NSE), Climate Bonds Initiative, Financial Sector Deepening (FSD) Africa and FMO - Dutch Development Bank.

## What is a green bond?

This being a fairly novel concept in Kenya, one may not really know what exactly a green bond is and what it entails. A green bond is essentially a fixed income instrument where issuers borrow funds from investors and later repay the investors at an agreed rate after a specific amount of time. The main distinguishing feature between a green bond and other bonds is that proceeds are earmarked exclusively for projects with environmental benefits, mostly related to climate change mitigation. Categories for eligibility for green project includes projects geared towards climate change mitigation, climate change adaptation, natural resource conservation, biodiversity conservation and pollution prevention and control. It is essentially a vehicle that enables an increasing pool of sustainable investors access to environmental projects.

## How was the concept of green bond birthed and materialized

The first green bond was launched by European Investment Bank in 2007 followed closely by the World Bank in 2008. This created the blueprint for sustainable and social responsible investment in the capital markets.

This came at a time when the Intergovernmental Panel for Climate Change, a body within the United Nations, provided data linking human action to global warming.

This necessitated the need to generate funds geared towards climate change mitigation, a crisis currently being experienced as we speak and felt globally with increased occurrences of natural disasters.

Subsequently, many countries have since adopted and issued green bonds. In Africa alone countries such as South Africa, Nigeria and Morocco and most recently Kenya have issued green bonds in various exchange markets.

## Why you should consider gearing your funds towards green bonds.

With the current looming climate change crisis currently being experienced now more than ever before, it is of most importance that every individual takes up a social responsibility to mitigate climate change. Investing in green bonds is one way one can take up a social responsibility to mitigate impacts of climate change by investing into sustainable projects. This financial mechanism is hugely important in providing sizable capital needed to fuel massive transformational projects with an aim of essentially saving the planet.



## Powers of the Capital Markets Authority



By *Lionel Nasbon Odhiambo*  
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The Capital Markets Authority (CMA) has the mandate of disseminating rules and regulations within its jurisdiction as well as ensuring the enforcement of the said rules and regulations. All companies that issue securities are regulated under the Capital Markets Act, the Companies Act, and the CMA's regulations. The CMA is mandated to supervise securities exchanges, fund managers, Central Depository Systems, custodians, investment banks, collective investment schemes, investment advisers, stock brokers, securities dealers, listed companies, credit rating agencies and venture capital firms.

The CMA has further introduced the Capital Markets Corporate Governance and Market Intermediaries Regulations 2010 which govern stockbrokers, investment advisers, fund managers, investment banks and other authorized securities dealers. These rules provide that each market intermediary shall have a board of directors that shall be collectively responsible for the governance of its business. The CMA in achieving its objectives has been accused of acting both as a law-maker and an enforcer. The legality of CMA's authority has been challenged on various occasions.

In the case of **Cementia Holding Ag & Another v Capital Markets Authority & 3 Others [2014] eKLR** whereby the Authority was questioned as to whether it had powers to inquire, either on its own motion or at the request of any other person, into the affairs of any person that had been licenced by the Authority, Justice Lenaola J made a holding that the CMA was a creature of the Capital Markets Act. The preamble to that Act stated that it was established for the purpose of promoting, regulating facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes. Under section 11(2) (cc) the Authority was empowered to impose sanctions for breach of the provisions of the Act or the Regulations made thereunder or for non-compliance with the Authority's requirements or directions. He further found that the provisions of section 11 of the Act indicate that CMA had the powers to regulate capital markets generally and it also had powers to ensure that the security market was orderly, fair and efficient. It was the best judge of the operations of those it had licensed and to confirm whether the licensees were acting in accordance with the regulations as laid down. The Judge found that the Authority was still the best forum to handle the disputes.

In the case of **Chadwick Okumu v Capital Markets Authority**, the Petitioner was the Chief Finance Officer of Uchumi Supermarkets Limited at the time when the Company was alleged to have suffered financial misappropriation. The Company reported the Petitioner to the Respondent, Capital Markets Authority (CMA) which issued penalties and sanctions to the Petitioner. Aggrieved by the sanctions, the Petitioner instituted proceedings against CMA. In the proceedings, the overall issue in contention was whether the Capital Markets Authority's Decision to

investigate, Prosecute, sit as the jury and convict the petitioner was ill-advised and contrary to provisions of Natural Justice. The Judge made a finding that the basic objective of the rule against bias was to ensure public confidence in the impartiality of the administrative adjudicatory process. The Court further held that the Principle of Natural Justice occupies a very important place in the study of the administrative law. Any judicial or quasi-judicial tribunal determining the rights of individuals had to conform to the principle of natural justice in order to maintain the rule of law. Effectively, procedural fairness required that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. It was further held that CMA performed the three roles contrary to the rules of natural justice. It was ill advised for CMA to investigate, prosecute, sit as the jury and convict.

That was a proper case for CMA to invoke Section 11A and to delegate its functions to an independent body. CMA ought to have delegated some of the functions as clearly permitted under the law. The Judge made orders among them being a declaration that the investigations, proceedings and/or hearing instituted by the Capital Markets Authority against the Petitioner were conducted in a manner that violated the principles of natural justice and consequently, the said proceedings and the consequential decision arising therefrom was null and void for all purposes.



# Extradition Proceedings



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Extradition may be defined as the formal legal process of surrender of a person convicted or suspected of having committed a crime by one country to another for purposes of trial or punishment. Extradition is mainly based on treaties entered into between sovereign states.

The main purpose of extradition is to ensure that criminals do not evade justice merely by crossing a boundary from the country where a crime was committed to another country.

Kenya has two (2) main statutes governing extradition. These are:-

- a) The Extradition (Contiguous and Foreign Countries) Act, Cap.76;  
This Act governs extradition proceedings between Kenya and other countries which are not members of the commonwealth and which have entered into suitable treaties with Kenya for purposes of extradition.
- b) The Extradition (Commonwealth Countries) Act, Cap.77.  
This Act governs extradition proceedings between Kenya and other countries which are members of the commonwealth.

The existence of the two statutes and the distinction between commonwealth and non-commonwealth countries on matters extradition is a reflection of Kenya's history as a former British Colony.

## Extradition Offences

The Offences which could be the subject of extradition proceedings are listed in the Schedule to the two statutes aforementioned. Some of the offences mentioned are: murder, manslaughter, rape, human trafficking, kidnapping, stealing a child, bribery, robbery, theft, money laundering, dealing in dangerous drugs and narcotics, organized criminal offences and terrorism.

## The Process of Extradition

### Step 1: Requisition

A request is made by the requesting state through a diplomatic representative or consular office for the surrender of the fugitive criminal to that country. In Kenya the requests are made to the Attorney General.

### Step 2: Order

Upon receipt of the request, the Attorney General may by Order under his hand signify to a Magistrate that a request has been made. The order requires the magistrate to issue a warrant for the arrest and detention of the fugitive criminal.

### Step 3: Issuance of a Warrant of Arrest

The warrant is issued upon receipt of the Attorney General's Order and further upon receipt of such evidence as would, in the opinion of the magistrate justify the issue of the warrant if the crime had been committed or the criminal convicted in Kenya.

A Magistrate may also issue a warrant upon receipt of information or complaint and such evidence as would, in the opinion of the magistrate, justify the issue of a warrant if the crime had been committed or the criminal convicted in Kenya. However, in

such a case the magistrate has to send a report of the issuance of the warrant and the supporting evidence to the Attorney General who may cancel the warrant and order the fugitive criminal to be discharged if he had been arrested pursuant to the warrant.

### Step 4: Arraignment Before a Magistrate

When a fugitive is arrested on a warrant, he has to be arraigned before a Magistrate as soon as possible.

### Step 5: Hearing of the Case and Evidence

The magistrate has the jurisdiction and powers just like during a trial in the subordinate courts. During the hearing, the Magistrate hears such evidence as would show that the subject offence is not an extradition offence or any other reasons stipulated in law as to why the accused should not be extradited. The proceedings may result in committal or discharge of the fugitive criminal.

### Step 6: Committal

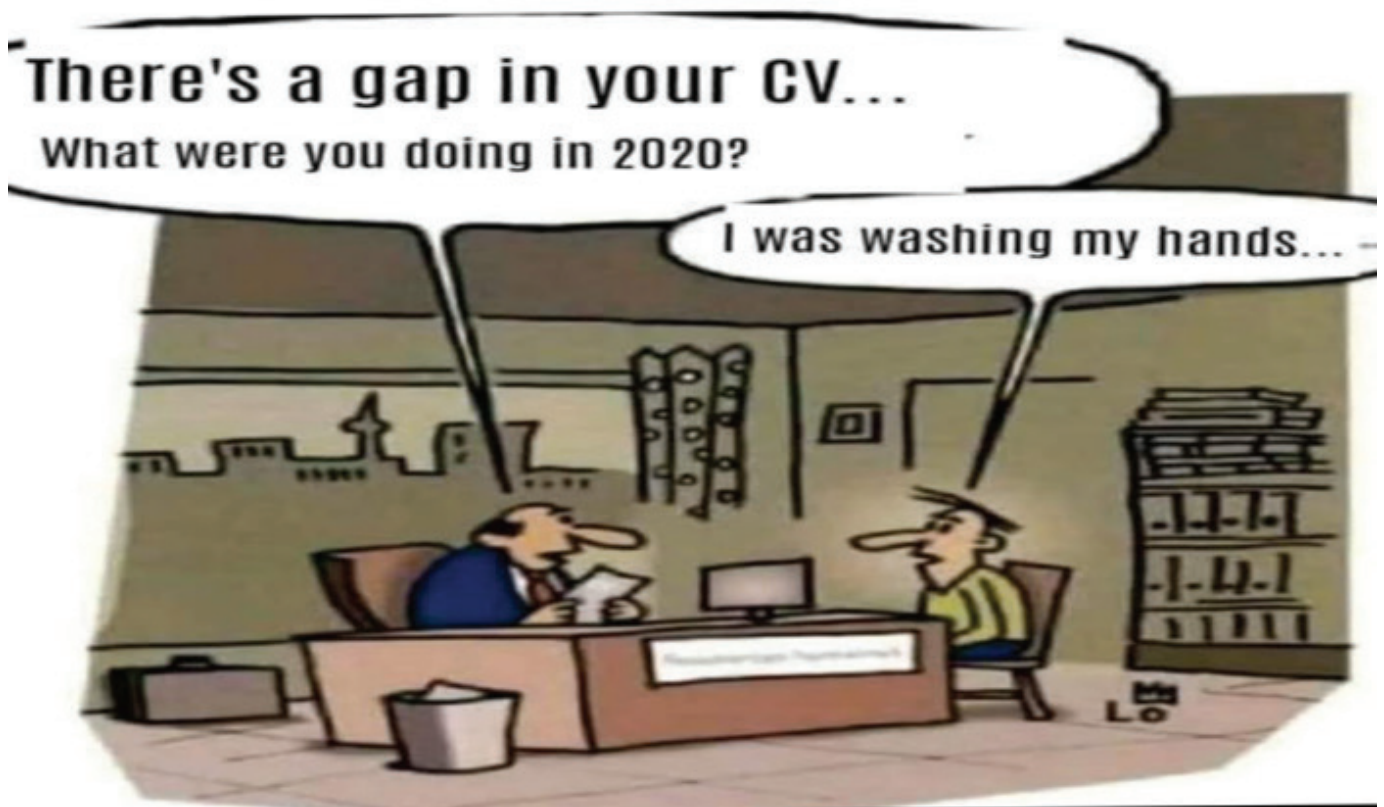
Upon committal the magistrate sends the Attorney General a certificate of committal or any other report of the case as he may think fit. The minister then sends a Warrant of surrender. Surrender occurs after 15 days. The fugitive has a right to apply for issuance of directions in the nature of habeas corpus.

## Principles of Extradition

1. Territoriality: territoriality requires that the offence for which extradition is sought be committed within the territorial boundaries of the requesting state.
2. Dual Criminality: the act for which extradition is sought, in addition to being a crime in the requesting nation, must be considered a crime in the requested nation as well. The offence must also be included in the list of offences found within the treaty.

**CONTRIBUTORS' PLATFORM**

- 3. Doctrine of Speciality: The principle of speciality provides that once the subject is transferred to the requesting State, they cannot be tried for an offence different from (or in addition to) the one for which they were extradited, without first obtaining the permission of the requested State.
- 4. Political Offences Exceptions: The political offences exception holds that a person cannot be extradited for an offence of a political character. Therefore, the magistrate or Attorney General may refuse to act if the offence in question is of a political character.



Together we stand, divided we fall  
Let us all remember to take care of ourselves  
Let us all ensure self serving jitters dissipate  
Let us all remember we are a people of pride a people of  
self respect and a people characterized by strength, not fear

**ACKNOWLEDGMENTS**

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## Notice to Clients

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**In light of the COVID-19 Pandemic, we are operating with a skeleton staff. However, our hours of business during this period are from 8:00am to 3:30pm. All the Advocates are available on email and telephone to attend to all matters as may arise**

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